

In re) Fair Hearing No. 11,660
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Appeal of)

3. At the suggestion of several friends and relatives, the child's mother took him to a psychologist in Burlington

who assessed him and found the child to be extraordinarily anxious. She advised the mother to get counseling for the child and referred her to a licensed psychologist in her area.

The mother decided to follow through with therapy because she was concerned that her son's anxiety would interfere with his entering school the next year.

4. The licensed psychologist hired by the mother, has done extensive work with abused children. She first saw the petitioner's son in July of 1990, when he was five years old.

She diagnosed the child as having severe anxiety akin to post traumatic stress syndrome and worked with him to reduce his anxiety for the next five months. Other than the general anxiety that the divorce itself was causing for both the children, the child's mother could not think of any particular source for such extreme anxiety.

5. At the time he began therapy, the boy was unable to stay in a room without his mother for more than a few minutes.

He continued to engage in constant throat clearing for no apparent physical reason. The child constantly checked to see if the room was locked. He refused to look at a book about children's bodies and touching. During playtime, he made sexual, penis-shaped objects from clay.

6. As therapy continued, the child continued to be fearful and made statements that he did not want to talk about or visit with his father. The psychologist was aware that issues had arisen in Court about the child's safety with the

father but the child made no statements as to any particular events which may have occurred. The child was so anxious when the subject of his father was brought up that the psychologist felt it better to avoid the subject. She advised the child's mother not to press for any details about his relationship with his father as well.

7. In October of 1990, the boy's mother came into the therapist's office with him and said that the boy had something to tell the therapist. The boy's mother then left the room and the boy said "Daddy pulled on my penis and it hurt". The boy was extremely frightened when he made the statement. He resisted any questions about where it happened and how many times and refused to talk any further about it. Because he was so upset, the therapist did not pursue it any further. After her session with the boy, she talked with the mother who appeared to be shocked and embarrassed by this revelation which had been spontaneously recounted to her in the same words, and with the same lack of further detail, earlier that day.

8. The therapist, because of state requirements, reported what she had heard to SRS. She was unsure as to whether this type of revelation should have triggered the reporting requirement. She was reluctant, given the child's anxiety, to subject him to further interrogation. She did not give the boy's name, and, as the boy's father had recently moved to Florida, she did not feel the child was really in

further danger.

9. Following the disclosure, the boy's anxiety decreased, and by November, it was decided that the therapy would cease as nothing more could come of it. The psychologist felt that further probing into the exact cause of the anxiety would be harmful to the child. The father's departure from the scene through his move to Florida was also felt to be contributing to the child's growing ease.

10. In March of 1991, someone at the Department of Social and Rehabilitation Services noticed the case and advised the therapist that she was required to report the information she gave in October more formally and allow the Department to make an investigation. That formal report was made on March 12, and the investigation was assigned to a very experienced social worker who holds a baccalaureate degree in nursing, a master's degree in special education and extensive training in child sexual abuse.

11. On March 15, 1991, a formal interview with the child was set up by the social worker and a state police officer. The child's mother was reluctant to get involved with the process because she feared that it might stir up things with her ex-husband. However, the Department persuaded her to accede and the child was interviewed. The police officer took notes of what questions were asked of the child and what answers were received. A copy of those notes is attached hereto as Exhibit One and incorporated herein by reference.

12. At the start of the interview, the boy was tested for his ability to tell the truth. It was observed that he knew the difference between truth and falsity and also that he was very anxious. He was unable to sit still and had an attention span of about ten minutes. He revealed during the course of the interview that he had been hurt by his father in the crotch area. The boy was given an anatomically correct doll and asked to show what his father had done. The boy pulled down the pants of the doll and pinched the head of the doll's penis. He stated that the pinching had occurred in a garage with no toilet to which he had ridden his bicycle. He added that his father had taken him there and that the same incident happened "fourteen days in a row". The weather outside was like spring and summertime when this occurred. He said that when his father touched his "pee" he told him not to do it, and that it hurt. He also told the investigators that his father told him not to tell his mom about it because "he would get in jail". The boy said he told his mother anyway and that he thought his father should stay in jail. He denied any other incidents such as the father's exposure of his genitals or being touched on the genitals by anything other than this father's hand.

13. It was the social worker's expert opinion that the child's disclosure used age appropriate language and detail and that his affect of anxiety was consistent with the story he was telling. As these opinions are not controverted in the

evidence they are adopted as findings of fact herein.

14. The social worker did not talk with the petitioner, both because he was living out of the state and because she believed that the family might be put in danger if he were interviewed. In April of 1991, a finding was made substantiating the allegations of abuse.

15. In May of 1991, the petitioner's ex-wife moved to modify the custody arrangement based on the Department's findings. The petitioner came back from Florida to defend the modification which was granted without making any findings that the boy was indeed sexually abused.

16. Following the investigation, the child was seen in follow up by his psychotherapist for two sessions in April and May of 1991. His therapist felt he was doing well and that his anxiety had decreased considerably.

17. The petitioner, thereafter, asked the Department for a review of the finding made in April. As part of the review held in September of 1991, the petitioner offered a polygraph test and medical records showing a lack of medical substantiation of the alleged abuse. The petitioner advanced no alternative explanation (such as a mistake or an accident), gave no alibi and offered no explanation for his son's statements.

18. The Department rejected the polygraph test as not probative. The lack of physical evidence was expected given the fact that the interview occurred about a year after the

alleged incidents took place. The Department decided to continue with the substantiation. Two further reviews were held by the Department which reached the same conclusion. The final internal review was conducted by the Commissioner on November 24, 1992.

19. The petitioner owns three abandoned buildings, sometimes referred to as garages, and has lived in them from time to time when he is in Vermont. He had taken his son there on a recurrent and regular basis in the spring of 1990.

20. The petitioner denies performing the acts set forth above and claims that the boy was abused by a casual friend of the mother, although there is no evidence that the child was ever alone with this person. As the boy did not express any ambivalence as to who abused him, there is no reason to credit this allegation.

21. A friend of the petitioner's testified that he was present at the garage one day when the petitioner's son's penis was accidentally caught in a zipper. However, the friend did not actually see the zipper incident but stated variously that he either guessed as to what occurred after hearing the child cry or heard about it from the petitioner later. The friend also testified that that the three garages could be seen from a factory but conceded that there were places inside the garages which could not be seen from the outside. There is insufficient evidence to make findings of no opportunity or accidental occurrence from these

allegations.

22. Based on the above, it appears more likely than not that the statements made by the child to his mother, his therapist and to the SRS investigator were a description of events which actually occurred in the spring or summer of 1990. The child's verbal description of what occurred (Dad pulled my "pee") is consistent with the action demonstrated on the doll. The child was able to describe the place where the event occurred, the time of year, the fact that it happened multiple times, and who the perpetrator was with relative clarity and consistency. The child's statements also made it clear that neither he nor his father understood the penis pulling as an accident or benign behavior as evidenced by his direct requests to his father not to pull on his penis and his father's response that he was to keep the matter a secret.

While coaching and fantasizing are always a concern, especially when the parents are feuding, there is no evidence of any motivation in the mother to persuade her child to make these statements. The mother had already obtained custody of the children and visitation was already severely restricted based on other actions of the father. The mother's concern for her child's psychological well-being is obvious in her obtaining therapy for her son and is inconsistent with her further traumatizing her child by making such suggestions to him. The child's traumatized affect when revealing this matter adds considerable credence to the fact that these

events really happened to him and were not mere recitations of what someone else told him to say.

It is, therefore, found that the petitioner intentionally pulled on and pinched his son's penis in the spring or summer of 1990 on one or more occasions causing him pain, for no legitimate reason.

ORDER

The decision of the Department to substantiate abuse is affirmed. The petitioner's request to expunge the registry record is denied.

REASONS

The petitioner has made application for an order expunging the record of the alleged incident of child abuse from the SRS registry. This application is governed by 33 V.S.A. § 4916 which provides in pertinent part as follows:

(a) The commissioner of social and rehabilitation services shall maintain a registry which shall contain written records of all investigations initiated under section 4915 of this Title unless the commissioner of the commissioner's designee determines after investigation that the reported facts are unsubstantiated, in which case, after notice to the person complained about, the records shall be destroyed unless the person complained about requests within one year that it not be destroyed.

. . .

(h) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the ground that it is

unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under Section 3091 of Title 3 on the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Pursuant to this statute, the Department has the burden of establishing that a record containing a finding of child abuse should not be expunged. The Department has the burden of demonstrating by a preponderance of the evidence introduced at the hearing not only that the report is based upon accurate and reliable information, but also that the information would lead a reasonable person to believe that a child has been abused or neglected. 33 V.S.A. § 4912(10), Fair Hearing Nos. 8119, 8646, and 10,136.

In this case, the Department has concluded that the child was sexually abused because his penis was pulled and pinched.

Sexual abuse is defined in the statute as follows:

(8) "Sexual abuse" consists of any act by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

In this matter, as is the usual case, there are no witnesses to the alleged abuse and no physical evidence. The sole evidence is the statement of a five-year-old boy made about six months after the alleged incident to his mother and a therapist which were related again in a more detailed way

some five months later to a police officer and a social worker. The Department's case rests solely on the credibility and clarity of that child's statements.

The Board has not required, and, in fact, has discouraged the testimony of allegedly abused children at its hearings in order to prevent further trauma to the victimized child in a purely civil matter. Instead, the Board has employed its relaxed hearsay rule to allow records or testimony as to the child's statement to be admitted in its stead. Fair Hearing No. 8816. The Board has repeatedly said that the weight to be given to the accuracy of the child's statements depends in part upon the reliability of the method of preserving those statements. Fair Hearing No. 10,136.

In this matter, there is no tape recording of the statements made by the child, which would have been most useful. However, there were contemporaneous verbatim written recordings of the questions asked and the child's statements from both the therapist and the police officer who interviewed him. These recordings make it highly likely that the child did make the actual statements reported at the hearing.

The reported statements of this child were unambiguous and presented in a context which indicated that both the child and the adult realized that the touching was inappropriate and traumatic. It must be concluded, therefore, that the Department's facts were accurate and reliable. There can be no doubt that pulling and pinching a child's penis is sexual

molestation. Sexual molestation is defined as sexual abuse in the statute set forth above. Therefore, it must be found that a reasonable person could conclude from the petitioner's actions that he had sexually abused his son.

As the evidence shows that the petitioner sexually abused his son, the Department has proven that the report it filed in the registry is substantiated and should not be expunged. The petitioner's request must, therefore, be denied.

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EVIDENTIARY RULINGS

After duly considering arguments by the petitioner, the Board concludes that the hearing officer properly excluded Exhibits No. 9 and No. 10 offered by the plaintiff. Exhibit No. 9 was offered to prove the lack of physical evidence in this case. As the Department had already stipulated to that fact, the proffered evidence was irrelevant. Exhibit No. 10 purports to be the record of an agency, but was not admitted for lack of authentication. The hearing officer explained the certification requirement and adjourned the hearing to allow the petitioner the opportunity to get certified copies of this and other documents. He failed, without explanation, to have this purported record certified. The certification on the document shows only that it had been filed with the Orleans Family Court and does not indicate that it had ever been

accepted into evidence in any proceeding.

The Board concludes that even if these documents should have been admitted, their addition to the evidence would in no way change the analysis or the result in this case.